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VIRGINIA
LAW REVIEW

VOL. IV. NOVEMBER, 1916 No. 2

THE EIGHT HOUR RAILWAY WAGE LAW.

THE conflict between the capital invested in the railroads in the United States and the labor involved in their operation having become so acute that their representatives could no longer agree upon the terms of employment, the fourth day of September, 1916, was definitely fixed for a strike of such magnitude as to involve the practical suspension of all railroad service in the United States for an indefinite period. The calamity with which the people of the United States were thus confronted involved a suspension of the mails and the stoppage of transportation at a time when the movement of the National Guard of the country might become imperative at any moment; the fruit crops stood in jeopardy of perishing; no manufacturing enterprise in the country would have been able to move its product; and the food supply in many localities would soon have been exhausted. There is hardly a man, woman or child in the land who would not have felt the loss, and it would be difficult to overestimate the number of those who would have suffered privation. Nor was there any hope that if the nation accepted the terrible consequence of permitting the railroads and their employees to fight it out, the settlement would be permanent whether labor won the fight or lost; for it is useless to hope that when those who have been dominated once learn to fight they will be easily discouraged by failure or restrained by success. The conflict between capital and labor has ever increased in its intensity as labor has become organized and more powerful in its influence, and the conflict will inevitably go on until it is definitely settled as to who shall be the master.

When an enterprise is private in its nature, we must rely for an adjustment of this conflict upon the natural laws of supply and demand—once regarded as controlling, but now often incompetent to protect the consumer from immediate sacrifice—at least until it is recognized that combinations to control the price of labor are often just as vicious as combinations to control the price of any other commodity, and the strike comes to be regulated by statute.

With a public service it is different. The right to contract has never been regarded as absolute.[1] It exists only where it does not conflict with the public welfare; and there is no reason why the public should consent to suffer great injury, in order to permit capital and labor to fight each other over terms of employment, when the practical result of the conflict must be the destruction of public business, property and welfare. There are three interests involved in the public railroad service: that of capital, that of labor and that of the people at large. The contribution of each is essential to the service. The man, the plant and the capital employed in the operation of interstate railroads are all equally to be regarded as instruments of the public service and subject to public control in the performance of that service.[2]

As early as the case of *Searight* v. *Stokes*,[3] Chief Justice Taney pointed out that:

> "The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the sessions of Congress, consists of communications to or from the officers of the executive department, or members of the legislature, on public service or in relation to matters of pub-

[1] Chicago, B. & Q. R. *v.* McGuire, 219 U. S. 549; Erie R. *v.* Williams, 233 U. S. 685; Holden *v.* Hardy, 169 U. S. 366; McLean *v.* Arkansas, 211 U. S. 539.

[2] *Ex parte* McNiel, 13 Wall. 236; Cooley *v.* Board of Wardens, 12 How. 299; Second Employers' Liability Cases, 223 U. S. 1.

[3] 3 How. 151, 169.

> lic concern. * * * We think that a carriage, whenever it is carrying the mail, is laden with the property of the United States within the true meaning of the compact."

This language was quoted with approval in the case of *In Re Debs*[4]

It appears, therefore, that in compelling the railroads to submit temporarily to the only scale of wages upon which they could conduct their business without serious interruption, the United States Government was simply prohibiting the railroads from destroying both public and private property, the value of which depended upon transportation. The question was not whether Congress should yield to the demand of labor for the passage of this statute, but whether Congress should permit the interstate common carriers to suspend the performance of their public functions, for which they had received so large a consideration from the hands of the public, in order to protect their private interests although this interest could be amply protected at a much smaller loss by a readjustment of the freight rates.

Not only were these instrumentalities engaged in the public service, but the business which they were conducting was made possible only by public consent and the right of eminent domain. The relation between the employer and the employee was in no just sense a private relation, for the public was concerned in that relation just as much as were the other two parties, not only because the rights and property of the public were directly involved, and not only because of the public concessions made in consideration of a publicly regulated service, but also because the public was to pay for the service rendered by the combined efforts of capital and labor at a rate of freight based upon the scale of wages.

Whenever there are three interests involved and it becomes apparent that there is a disagreement between two of these interests which they cannot settle between themselves without great injury to the rights and property of the third, it is but natural and proper that the third party should assert its legitimate power to compel the other two to come to terms. When, therefore, the railroads and their employees have reached a point where they

[4] 158 U. S. 564, 584.

can no longer agree, and where this disagreement threatens to destroy the public service, the time has assuredly come when the public must say to them, "You must either serve the public or you must give up your franchise, and if you cannot serve the public by paying one wage, you must pay another."

No one will deny the wisdom of investigation before action whenever investigation is possible; but it is equally plain that there are many situations in life when men must act upon their judgment and act at once rather than suffer injury from delay necessarily incident to investigation. It is often necessary to preserve the *status quo* while an investigation proceeds; and this may not be denied by any person who is familiar with the chancery practice of using injunctions *pendente lite* in order to preserve the *status quo* until investigation can be made. When an injunction of this kind is necessary at all, it is always necessary to act without such an investigation as would justify a final decree in order to preserve the subject matter of the inquiry until it can be ascertained where the right of the matter really lies. To destroy this writ, so as to enable one party to destroy the subject matter of the controversy pending an investigation by the court, would be to deprive the administration of justice of one of its most efficient instruments.

In this instance, the subject matter of the controversy was the public service, for it is upon this service that the burden of the threatened strike would have fallen if the strike had been consummated; and more than this, there would have been no possible way of adjusting the loss after it had once occurred. On the other hand, there was not the slightest difficulty in protecting the railroads from any loss they might suffer by reason of fixing an excessive scale of wages pending an investigation if it should be determined that the scale was too high. The charges which the interstate common carrier is permitted to demand from the public for its service are fixed by law, and are necessarily based upon the scale of wages paid. It would never be possible to determine whether any rate was fair or whether it was confiscatory except by taking into consideration the wages which the railroads must pay for the service of their employees, and whenever it is determined that the scale of wages which is fixed by the

demands of labor or by an enactment of Congress is so high that the prevailing freight rate is inadequate, there is not the slightest difficulty in administering justice through the Interstate Commerce Commission. Congress was, therefore, confronted with a situation in which a failure upon its part to act would result in inestimable damage to the public; a situation in which it could avoid this damage only by fixing a temporary rate at which the men were willing to work, for it is manifest that it was entirely beyond its constitutional power to compel the men to work; a situation in which there was no danger of doing any injustice to any interest, as it was easily within the power of Congress and of its agencies to reimburse the railroads for any injury which preliminary regulation might do, by increasing the freight rate if necessary, just as it is within the power of the courts to reimburse any injury which they may do by the issuance of a temporary injunction or injunction *pendente lite* by an action upon the bond.

In this dilemma, Congress acted, and we turn to the inquiry as to whether it is within the constitutional power of Congress to regulate the scale of wages to be paid by those engaged in public interstate service. Confiscation was not involved; because confiscation could result only from a disproportion between the scale of wages and the scale of freight, and, so long as the scale of freight is movable, there can be no difficulty in adjustment. Treated as a regulation of the hours of labor by trainmen, the validity of the statute is, of course, beyond discussion.[5] While it is doubtless true that the enactment tended strongly to the esablishment of an eight hour day, it must be conceded that that which the statute directly enacted was to regulate the wages to be paid by the railroad companies to their employees for a limited period pending an investigation. It therefore remains only to inquire whether the fixing of the scale of wages to be paid to the employees of interstate railroads was within the constitutional power of Congress to regulate interstate commerce.

It is now too late to question the power of Congress to regulate the rate of freight to be charged for the service of an interstate common carrier. And the power to determine what

[5] Holden *v.* Hardy, *supra;* Lochner *v.* New York, 198 U. S. 45.

compensation is to be allowed for the whole service necessarily carries with it the power to determine just how that compensation shall be divided among the different instrumentalities which go to make up the common carrier as a whole. In order to determine what is a proper freight rate, it is, of course, necessary to inquire what are the elements which enter into the service: what is the cost of the track, its construction and its maintenance; what is the extent of the investment in rolling stock, and what is necessary for its maintenance; what is the cost of the labor contributed; and what should be the profit allowed on the capital invested. To say that Congress has no power to fix the compensation to be allowed to labor is as unwarranted as it is to say that Congress has no power to deal with the subject as to the compensation which is allowed on the capital invested. Indeed, the power of Congress to fix, or to limit, the compensation which the interstate common carrier shall pay to its employees necessarily results from the simple fact that this compensation is only a part of that which is allowed to be collected from the public, and that the allowance which must be made for the performance of labor is not to be differentiated from the allowance that is to be set apart as compensation for the use of the capital invested. Congress has, indeed, so frequently enacted, and the Supreme Court of the United States has so frequently supported, other statutes of a similar character, that it is difficult to realize that the constitutionality of such a statute should now be inveighed against.

The pilot who directs the ship into port stands upon the same footing as the engineer who directs the locomotive. The power of Congress, and, indeed, the power of the states, to fix the compensation which shall be paid to pilots is based upon the idea that they are engaged in a public service in which the people at large are concerned. Congress could regulate their charges only under the interstate commerce clause of the constitution; but the power of Congress to fix the compensation which should be paid to the pilot for his personal services was settled from a very early period. In the case of *Ex Pare McNeil*,[6] Judge Swayne, in rendering the opinion of the court, said:

[6] *Supra.*

"It must be admitted that pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; and half pilotage, as it is called, is a necessary and usual part of every system of such provisions."

This case involved the validity of a statute not only fixing the compensation which a pilot should receive for his services, but compelling the ship to pay half pilotage if it had not accepted the services of the pilot when tendered. The author of the opinion pointed out that from time immemorial the compensation of pilots has been regulated by the states. The Act of Congress approved August 7, 1789,[7] provided that pilotage should be regulated by the existing laws of the states, or such laws as the states should thereafter enact, until further provisions should be made by the Congress, and this provision is now found in the Revised Statutes of the United States.[8] In the case of *Gibbons* v. *Ogden*,[9] the Supreme Court of the United States held that Congress has the power of reenacting the state statutes upon this subject, and from this early date down to the present time no one has successfully questioned the constitutional power of Congress to fix the rate of compensation as a regulation of commerce.

In the case of *Charlotte, C. & A. R. Co.* v. *Gibbes*,[10] there came before the Supreme Court of the United States the question as to whether it was competent for the state to require the railroads to pay a fixed salary to railroad commissioners for their services. It will be observed that, as in the case of pilots, the services of the railroad commissioners was compulsory—the railroads were not permitted to say whether they cared for the service or not. Speaking of the subject, the court said:

"Though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are invested for that purpose with special privileges. They are allowed to exercise the States' right of eminent domain that they may appropriate for their uses the necessary property of others upon paying just com-

[7] 1 Stat. L. 54.
[8] § 4235.
[9] 9 Wheat. 1.
[10] 142 U. S. 386.

> pensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates; and they are authorized to charge reasonable compensation for the services they thus perform. Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. * * * That regulation may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding, under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation, and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operations of whose roads and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the Fourteenth Amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws nor making any unjust discrimination against them."

There is really nothing new in the fixing of the compensation to be paid by the common carrier for services which they receive from individuals and other corporations assisting them in the performance of their duties. We are all familiar with the regulation of switching charges, the regulation of tap line services, and the like.

In the case of *Cooley* v. *Board of Wardens,*[11] the action was to recover half pilotage fees under the 29th section of the act of the Legislature of Pennsylvania passed in 1803, and the court said:

> "The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used."

The court held that the fixing of the pilotage fees was nothing more nor less than a regulation of commerce.

It has long since been settled that a state may regulate the method of compensating coal miners.[12] In the case of *McLean* v. *Arkansas,*[13] the Supreme Court of the United States upheld the statute of Arkansas requiring coal to be measured for payment of miners' wages before screening it. The court said:

> "But in many cases in this court the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract."

The court then proceeded thus to enumerate a number of instances in which the Supreme Court had upheld the power of Congress to fix the compensation which should be received for particular services:

> "In *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13, it was held that an act of the legislature of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employés, did not conflict with any provisions of the Constitution of the United States protecting the right of contract.
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> "In *Frisbie* v. *United States,* 157 U. S. 160, the act of Congress prohibiting attorneys from contracting for a larger

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[11] *Supra.*

[12] Rail Coal Co. *v.* Ohio Industrial Comm., 236 U. S. 338; Holden *v.* Hardy, *supra.*

[13] *Supra.*

fee than $10.00 for prosecuting pension claims was held to be a valid exercise of police power.

"* * * The statute fixing maximum charges for the storage of grain, and prohibiting contracts for larger amounts, was held valid. *Munn* v. *People of Illinois,* 94 U. S. 113.

"In *Patterson* v. *Bark Eudora,* 190 U. S. 169, this court held that an act of Congress making it a misdemeanor for a ship-master to pay a sailor any part of his wages in advance was valid."

In the case of *Munn* v. *Illinois,*[14] the Supreme Court of the United States upheld the statute regulating warehouse charges, and said:

"From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases,* 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington 'to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread,' 3 Stat. 587, Sect. 7; and, in 1848 'to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen and draymen, and the rates of commission of auctioneers.' "

[14] 94 U. S. 113, 125.

The court then proceeded to point out at great length that whatever may be the right of a private citizen to demand whatever he can get for his own services or for the use of his property; yet when he and his property become engaged in a public business, they become affected with the public interest, and cease to be *juris privati* only, and are subject to the public control.

In the case of *St. Louis, Iron Mtn. & St. Paul Ry. Co.* v. *Paul,*[15] the Supreme Court upheld the statute requiring employees to be paid in money when discharged. In the case of *Erie R.* v. *Williams,*[16] the Supreme Court upheld the law requiring railroad employees to be paid twice a month. In the case of *Morgan's S. S. Co.* v. *Louisiana Board of Health,*[17] it was held that Congress could fix quarantine fees. And seamen's wages have always been regulated.[18]

It seems, therefore, to be clear that it is within the power of Congress at all times to regulate the wages which are to be paid by the interstate common carrier to its employees. It possesses this power because the employer and the employee are engaged in the public service. The business which they are carrying on is made possible by public concession and the public is a party to the enterprise. The regulation of such a business has always been vested in the government, not for the benefit of the employer or of the employee, but for the benefit of the public whom they both serve. The rates of compensation which they may receive from the public for the entire service are definitely fixed; and where there are several elements which go to make up that service —such as the contribution of labor, the property used and the capital invested—the compensation of each of these must be taken into consideration in fixing the rate for the entire service, and the distribution of the freight rate allowed for the entire service amongst the different contributors to that service, must necessarily be within the power of Congress, in whom the regulation of compensation for the entire service is vested, and the exercise of this power may be by way of fixing either a minimum or a maximum compensation to be paid.

The fixing of the minimum compensation has been necessary in this instance to preserve the service temporarily pending an in-

[15] 173 U. S. 404.
[16] *Supra.*
[17] 118 U. S. 465.
[18] 6 Fed. Stat. Ann. 862.

vestigation; but the time may not be far distant when the exercise of this power will be absolutely essential to enable the common carrier to perform its functions upon a reasonable tariff of freight, from the standpoint of the public, without a sacrifice of all compensation for the capital invested and resulting confiscation by reason of the demands of labor which are so rapidly increasing. The power of Congress to fix the scale of wages is exercised today by fixing a minimum which shall be paid for labor; but it may be necessary tomorrow to exercise that same power in fixing a maximum, in order that the common carrier, as a whole, may be enabled to serve the public upon a reasonable basis.

Congress, of course, has no power to compel any man to work for the interstate common carrier for less than he may be pleased to demand; for while idle or engaged in some private employment he is not an instrument of interstate commerce. His doings are not concerned with the public, and his power to contract cannot be limited. Nor can Congress compel the owners of the physical properties which constitute the railroad, or the capital which is used in its operation, to enter into any contract for service in regard to any private undertaking.[19] But it is within the power of Congress to prescribe the terms of any contract which has to do with the public service by interstate common carriers, and it may be confidently asserted that when the scale of wages which the railroads are compelled to pay becomes so great as to make the present freight rate impracticable or unfair, that freight rate will be readjusted until the demands of labor become so great that capital cannot receive a fair return for its contribution to the service without imposing upon the public a burden which is disproportionate to its real value, and when this happens Congress must fix a scale of wages which will be fair to all parties concerned. Thus it may come to pass that the power of Congress to fix the scale of wages for the employees of interstate railroads, will some day prove to be the greatest safeguard that exists against ruinous injustice towards the capital invested in interstate railroads.

MOBILE, ALA. *Harry T. Smith.*

[19] Adair *v.* United States, 208 U. S. 161.